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No. 89-389

In The

Supreme Court of the United States

October Term, 1989

FATHER RICHARD McDONNELL,

Petitioner,

v.

EPISCOPAL DIOCESE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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EPISCOPAL DIOCESE OF GEORGIA,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

STATEMENT OF THE CASE

On April 13, 1984, Petitioner, Father Richard McDonnell, was offered a position with Respondent, Episcopal Diocese of Georgia. The Petitioner accepted the offer, becoming the Vicar of the Church of Annunciation in Vidalia, Georgia, and the Priest-in-Charge of St. Thomas Aquinas Church in Hazelhurst, Georgia. The Vidalia church was an organized mission of the Diocese; the Hazelhurst church had not yet been recognized as an organized diocesan mission.

At the time of Petitioner's employment, Father McDonnell was furnished by Respondent a manual entitled, "Diocesan Policies and Practices and Liturgical Customary" (hereinafter the "Manual"). The Manual set forth various information on the conduct, duties and practices of the clergy and the laity. The Manual also outlined liturgical customs and accepted ceremonies. However, contrary to Petitioner's conclusion, the Manual did not guarantee Petitioner a three-year minimum period of employment. In fact, under a provision in the Manual entitled, "Involuntary Termination", the Manual stated:

> It is recognized that, from time to time, a pastoral situation may occur which might necessitate a priest's removal from his cure. The Diocesan Council has urged the Diocesan to offer such a clergyman a reasonable period of transition, during which he may be released of all pastoral responsibilities.

Approximately one and one-half years after Father McDonnell commenced his duties under the Episcopal Diocese of Georgia, Petitioner received formal notice of his termination, effective November 30, 1985. This termination followed several conferences between Father McDonnell and the Bishop regarding Petitioner's inadequate performance of his duties. On at least one occasion, the Church of Annunciation requested Father McDonnell to resign his position.

Petitioner brought this suit challenging the contractual and legal authority of the Episcopal Diocese of Georgia to terminate his employment before the end of a three-year tenure. The Superior Court of Chatham County in the State of Georgia granted the Diocese's motion for summary judgment. After oral argument, the

Court of Appeals for the State of Georgia affirmed this result, ruling the exercise of its jurisdiction would violate the First and Fourteenth Amendments of the United States Constitution. The Supreme Court of Georgia denied Petitioner's Petition for Writ of Certiorari in the case. For the following reasons, this Court should not grant certiorari as Petitioner requests.

SUMMARY OF THE ARGUMENT

A. Petitioner's claims rely solely on the Manual provided to him pursuant to his employment with the Episcopal Diocese of Georgia. Petitioner argues this Manual guarantees to him a minimum tenure of employment for three years. Yet, aside from the Manual itself specifically authorizing involuntary termination, the Manual provision on which Petitioner has premised his case is in direct conflict with the Canons of the Episcopal Church. Based on the hierarchical organization of the Episcopal Church, a decision by a Georgia civil court as to which directive is superior constitutes a constitutionally impermissible entanglement with religion in violation of the Establishment Clause of the First Amendment, as made applicable to the states through the Fourteenth Amendment.

B. Petitioner has attempted, in his Petition for Certiorari, to create a conflict between the decisions of the state courts on establishment issues. However, the cases cited by Petitioner are not only consistent in their holdings, but support Respondent's case. The

strict deference test has been consistently followed by the state courts dealing with canonical issues in a hierarchical church system. Due to this consistency, Petitioner has failed to show a controversy upon which this Court must take cognizance. Petitioner's Writ of Certiorari must, therefore, be denied.

C. Petitioner has argued that for this court to defer to the decisions of the Episcopal Diocese of Georgia, would impermissibly accomodate religion. Yet, this Court has long recognized that the government sometimes must treat religious entities differently in furtherance of the First Amendment's Free Exercise clause. Strict deference in the instant case does not unconstitutionally foster religious practice. In fact, for this court to not defer would amount to a violation of the Establishment Clause.

ARGUMENT

A. THE CANONS OF THE EPISCOPAL CHURCH CONFLICT WITH THE MANUAL PROVISIONS RELIED UPON BY PETITIONER: IT IS AN EXCESSIVE ENTANGLEMENT WITH RELIGIOUS DOCTRINE FOR A STATE COURT TO DECIDE WHICH ECCLESIASTICAL REGULATION IS SUPERIOR.

The facts of this case require courts of law to apply the strict deference test of *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). The *Milivojevich* court found a "constitutional mandate" for civil courts to:

> [A]ccept the decisions of the highest judicatories of a religious organization of hierarchical polity

> on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law.

Id. at 713. Accordingly, a court is prohibited by the First and Fourteenth Amendments from analyzing or inquiring into the procedures ecclesiastical law or canon requires the church to follow. *Id.*

The court in *Milivojevich* quoted with approval an earlier Supreme Court decision, *Gonzales v. Archbishop*, 280 U.S. 1 (1929), a case particularly relevant to the instant case. In *Gonzalez*, the Supreme Court held the appointment of a chaplain in the Roman Catholic Church was a "canonical act." *Gonzalez v. Archbishop, supra* at 16. The church authorities' determination of what the essential qualifications of a chaplain were and whether a particular chaplain candidate possessed these qualifications. went to the very heart of religious hierarchical decisions and thus was not subject to review by a civil court. *Id.*

The *Milivojevich* and *Gonzalez* decisions are dispositive in the present controversy. The Episcopal Church is a hierarchical organization. This is especially true with the church's dealings with an organized mission. The Canons of the Diocese of Georgia state that, "the constitution and Canons of the Episcopal Church and of the same Church in the Diocese of Georgia, are hereby established as authority for the operation and administration of Organized Missions of this Diocese." Canon II.6.5.

Yet, despite the hierarchy of power outlined above, Father McDonnell claimed the Manual which he received at the time of his employment to be the ultimate authority on the employment practices of the Episcopal Church. Petitioner alleged the Manual guaranteed him a

three-year term of employment. This assertion is in direct contrast to the specific provisions in the Manual allowing for involuntary termination of clergy and, more importantly, in direct contrast to the Diocesan Canons of the Episcopal Church, which specifically state mission clergy may, at the discretion of the Bishop, be suspended or removed. Canon II.6.2. Also, contrary to Petitioner's implications, the Canons are amendable only upon a vote by a ruling convention. Canon V.1. The Manual itself fails to state any authority to amend the Canons. In fact, as shown by the foreward to the Manual, it was written by the Bishop and the diocesan administrator and is described as a collection of "diocesan directives" and as "policies" supplementary to those "formally established by Diocesan Canon."

In order to determine whether there is a conflict between the Canons and the Manual and how such a conflict should be resolved in the instant case would require a court to delve into church doctrine. Such a decision, according to this Court's holdings in *Milivojevich* and *Gonzalez* is an impermissible entanglement into ecclesiastical concerns, which reach far beyond Petitioner's property claims for breach of contract. As a result, Petitioner's Petition for Writ of Certiorari should be denied.

B. PETITIONER'S WRIT OF CERTIORARI MUST BE DENIED SINCE PETITIONER HAS FAILED TO SHOW ANY CONFLICT BETWEEN STATE COURT DECISIONS ON PETITION'S FIRST AMENDMENT ESTABLISHMENT ISSUES.

Petitioner bases his first argument in this Writ of Certiorari on an alleged judicial conflict between the

decisions of the state courts of Georgia and the state courts of Illinois and New York. Petitioner claims the Georgia Court of Appeals' strict deference to the highest authority of the Episcopal Church, i.e. the Canons of the Episcopal Church, cannot be reconciled with the Illinois cases of *Lily of the Valley Spiritual Church v. Sims*, 523 N.E.2d 999 (Ill. App. 1 Dist, 1988), and *Aglikin v. Kovacheff*, 516 N.E.2d 704 (Ill. App. 1 Dist, 1987), and the New York case of *Mays v. Burrell*, 508 N.Y.S.2d 226 (App. Div. 1986). Despite Petitioner's contentions, the courts of Illinois and New York are in line with both United States Supreme Court decisions and the Georgia Court of Appeals.

Every one of these cases follow the principle outlined in *Serbian Orthodox Diocese v. Milivojevich, supra,* which ruled:

> Where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine of polity before them.

Id. at 709. The Georgia Court of Appeals decision, in affirming summary judgment in favor of the Episcopal Diocese of Georgia, relied on the *Serbian Orthodox Diocese v. Milivojevich* case as authority for its deference to the Canons of the Episcopal Church. Likewise, the two Illinois cases and the New York case cited by Petitioner defer to the *Milivojevich* rule, albeit in different terms.

In *Lily of the Valley Spiritual Church, supra,* the Illinois court expressly recognized:

> [W]hen matters of religious doctrine and practice are at issue in property disputes involving hierarchical church organization, civil courts must defer to any resolution of these issues reached by the highest authority within the church organization.

Id. at 1001. Yet, the *Lily of the Valley* court found this principle inapplicable because there was "no evidence the plaintiff church [was] anything other than an independent, congregational religious society governed by its own rules." *Id.* at 1002. The court could inquire into church practices without excessive entanglement due to a lack of any conflict between a higher ecclesiastical authority and the rules by which the lower church authority took action.

By contrast, in Petitioner's cited authority of *Mays v. Burrell, supra,* the court not only acknowledged the *Milivojevich* rule, but found court interference in deciding whether a pastor violated the authority of the Deacons of the Antioch Baptist Church was an impermissible interference in internal church affairs. Similarly, in Petitioner's cited case of *Aglikin v. Kovacheff, supra,* the court ruled that in a hierarchical church organization, "when doctrinal or polity issues arise in the determination of a property dispute, the courts must defer to the resolution reached by the church's highest ecclesiastical authority." *Id.* at 707.

The impact of the above-delineated cases is anything but inconsistent with both the *Milivojevich* rule and *Jones v. Wolf,* 443 U.S. 595 (1978), a case heavily relied upon by

Petitioner. *Jones v. Wolf*, in fact found the strict deference test of *Milivojevich* would apply even when courts are thrust into resolving church property disputes. *Id.* at 602, 609 footnote 8.

Since Petitioner has failed to show the existence of a conflict between state court decisions on matters involving hierarchical intra-church disputes, his Petition for Writ of Certiorari must be denied. (See Rule 17 of the Rules of the Supreme Court of the United States.) There is no inconsistency in the law between the states nor between Supreme Court decisions regarding Petitioner's claims. All of the cases cited by Petitioner recognize the strict deference test of *Milivojevich* when dealing with conflicts between the doctrine of the highest church authority and actions taken by lower echelons of church organization.

C. APPLICATION OF THE STRICT DEFERENCE TEST WILL NOT UNCONSTITUTIONALLY ACCOMODATE RELIGION.

Petitioner's second argument claims the "accomodation" of the Episcopal Church of Georgia's decision to terminate Father McDonnell amounts to an impermissible fostering of religion. Petitioner relies on the case of *Hobbie v. Unemployment Appeals Comm'n of Florida*, ___ U.S. ___, 107 S.Ct. 1046 (1987), asserting that to treat the Episcopal Diocese of Georgia different from other organizations is an unconstitutional establishment of religion.

Yet, the *Hobbie* case essentially rejected this argument. The *Hobbie* court stated:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.

Id. at 1051. A court or state may, and sometimes must, in furtherance of the First Amendment's Free Exercise clause, accomodate the doctrine and practices of a religious entity. For example, the judicial exemption of Amish children from state-mandated compulsory attendance in high school was not an impermissible establishment of religion. *Wisconsin v. Yoder,* 406 U.S. 205 (1972). Neither was the familiar practice of according church organizations tax-exempt status an unlawful acommodation. *Walz v. Tax Comm'n,* 397 U.S. 664 (1970).

Application of the strict deference test to the present case will not impermissibly foster religion. Moreover, if this Court does not defer to the hierarchical decision of the Episcopal Diocese, the lack of deference will amount to an establishment. As this Court recently stated in *County of Allegheny v. American Civil Liberties Union,* ___ U.S. ___, 109 S.Ct. 3086 (1989):

> In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and *may not involve itself too deeply in such an institution's affairs.*

Id. at 3099 (emphasis added).

As previously argued in this Brief, for this Court to decide the superiority of hierarchical church directives will be an excessive entanglement with religion, a result prohibited by the First Amendment.

CONCLUSION

Petitioner's Writ of Certiorari must be denied for three reasons. One, civil courts, including this Court, cannot exercise their jurisdiction over hierarchical intra-church disputes, particularly those involving canonical practices and doctrine. Second, Petitioner has failed to delineate a controversy between state court decisions which this court must resolve; the state court decisions are consistent in their application of the strict deference test. Third, application of the strict deference test is not an impermissible accomodation of religion.

Respectfully submitted, this 28th day of September, 1989.

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APPENDIX

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Section II

CONSTITUTION, CANONS,

RULES OF ORDER

TITLE II

CANON 6

Diocesan Missions

* * *

Section 2. The Missions of the Diocese shall be under the supervision and control of the Bishop. He shall appoint all Mission clergy and may, at his discretion, suspend or remove them.

* * *

Section 5. RULES FOR THE OPERATION AND ADMINISTRATION OF AN ORGANIZED MISSION OF THE DIOCESE.

The Constitution and Canons of the Episcopal Church, and of the same Church in the Diocese of Georgia, are hereby established as authority for the operation and administration of Organized Missions of this Diocese.

* * *

TITLE V

CANON 1

Quorums and Amendments

Section 1. In all cases in which a Canon directs a duty to be performed or a power to be exercised by the Standing Committee, or by the clerical members thereof, or by any body consisting of several members, a majority of the members, the whole being duly cited to meet, shall be a quorum; and the majority of the quorum so convened shall be competent to act, unless the contrary be expressly required by Canon or some existing chapter.